IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.231 OF 2004

Ramdas Gaurya Thakur ..**Appellant**
(Orig.Plaintiff)

Versus

1. Shri Parshuram Kamlakar Thakur
2. Shri Laxman Kamlakar Thakur
3. Kashibai Kamlakar Thakur... **Respondents**
(Orig. Defendants)

Adv. Ms. Gauri Godse for the Appellant
Adv. Ms. Sharvari Shailendra i/b. Mr. P.S. Dani for Respondent Nos.1 & 3

CORAM : ***S.R.SATHE,J.***
DATED : ***10th JULY,2007***

ORAL JUDGEMENT :-

1. The original Plaintiff in Regular Civil suit No.42 of 1985 has preferred this appeal against the judgement and order passed by the Court of Additional District Judge, Raigad in Civil Appeal No.196 of 1994 whereby decree for possession passed by the Trial Court was set aside and Plaintiff's suit for possession was dismissed. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiff' and 'Defendant'.

2. The brief facts giving rise to this appeal are as under :-

The house property bearing No.51 situated at Div, Taluka : Pen is owned by the Plaintiff. According to him, on the northern side of his house, there is a garden and beyond that on the eastern side, there is Vrindavan and on the northern side of the garden and the said Vrindavan, there is gavthan land. All this property was self acquired property of Plaintiff's father. The defendants were not at all concerned with the same. The defendant Nos. 1 and 2 are the sons of defendant No.3. In February-1985, the defendant started construction on the northern side portion of the garden and on the open space beyond that portion. Plaintiff, therefore, made a complaint application to the Gram Panchayat and according to Plaintiff, stumps were fixed on the disputed sight by the Gram Panchayat and the construction was stayed by the Gram Panchayat. The defendants actually carried out the construction up to plinth level as the defendants did not stop the work Plaintiff filed Regular Civil Suit No.42 of 1985 for directing the defendant to remove the encroachment of 25' x 11' on northern side of courtyard of house No.51

and also the encroached portion of 15' x 18' adjacent to the eastern side of Vrindavan.

3. The defendants filed their Written Statement and opposed the suit claim. They contended that description of the property given by the Plaintiff is wrong and Plaintiff was never in possession of the northern side portion of the garden so also gavthan land. They also denied the measurement of the said portion given by the Plaintiff. It was their contention that the entire open space of gavthan as well as garden is owned by the father of the defendant Nos. 1 and 2 and the same is in their possession. Even plants grown up in the garden belong to the defendant. They also admitted that they started construction of new house at the place of old house. According to defendant, the property where the construction was carried out was gifted to the father of the defendant Nos. 1 and 2 by one Hashi Thakur. They also denied the allegation that Gram Panchayat had stayed the construction. Hence, on all these grounds, defendant prayed for the dismissal of the suit.

4. On these pleadings, the learned Trial Judge framed issues at Exh-22.

5. In support of their respective cases both the parties adduced oral and documentary evidence. After considering the said evidence the learned Trial Judge came to the conclusion that Plaintiff has proved that the defendants have made an encroachment as alleged. He, therefore, passed decree for possession in favour of Plaintiff.

6. The above mentioned order was challenged by the defendants in Civil Appeal No.196 of 1994. After hearing the arguments of both the learned Advocates, the learned Additional District Judge came to the conclusion that the Plaintiff has failed to prove the alleged encroachment. He, therefore, allowed the appeal and dismissed the Plaintiff's suit.

7. Being aggrieved by the above order the Plaintiff has filed the present Second Appeal. In this appeal before me Ms. Godse learned Advocate for the Plaintiff has urged only two points. She submitted that

the learned first Appellate Court has not properly appreciated the evidence and has accepted the evidence for which there were no pleadings. She, therefore, submitted that the substantial question of law in this appeal is whether the learned Additional District Judge committed error in accepting, evidence of defendants in the absence of defendants pleadings in that behalf. She, therefore, submitted that the appeal be allowed and decree passed by the Trial Court be restored.

8. As against this, the learned Advocate for the defendants supported the judgement and order passed by the learned First Appellate Court and submitted that no substantial question of law is involved in the appeal and as such the same be dismissed.

9. It is not in dispute that present suit is for recovery of the possession of the encroached land. Naturally, it was absolutely essential for the Plaintiff to give details about the alleged encroachment. It was also necessary for him to give boundaries so as to identify the property and also produce sketch of the alleged encroached portion

alongwith plaint as per the provisions of order-7 and rule-3 of CPC. But it seems that the Plaintiff has not given any such sketch alongwith the plaint. The boundaries given by him are also not sufficient for the correct identification of the property. When such is the position no decree for possession or for removal of encroachment can be passed.

10. The Plaintiff has based the suit on the sale deed executed in favour of his father on 14/03/1925. He has produced the said sale deed at Exh-118. Admittedly, the said sale deed is not registered obviously because the property was purchased for Rs.60/- only. However, it must be noted that the Sale Deed indicates that Plaintiff purchased two open lands. Naturally, it was necessary for the Plaintiff to show that the land in question is the same which is mentioned in the Sale Deed. It is not in dispute that the property of defendant is adjoining to the property of the Plaintiff. When such was the position, it was in fact necessary for the Plaintiff to get the land measured through DILR but the Plaintiff has not done so. Not only that but we find that though Plaintiff alleged

that the Gram Panchayat had fixed stumps after carrying out measurement, the Plaintiff did not adduce cogent evidence in that behalf. As per the rule of best evidence plaintiff should have produced the measurement plan of Grampanchayat. Thus, we find that the Plaintiff has failed to adduce convincing evidence to show that the suit land forms part and parcel of the land purchased by his father.

11. The defendants have contended that the disputed property was in fact gifted to their father and they have carried out the construction at the place where they have old house. Much is made about the fact that though in evidence the defendants have come out with a case that property bearing Nos.50 and 80 are owned by them and house No.80 is in fact situated on the suit property, the defendants had not pleaded accordingly in his Written Statement. It was, therefore, argued on behalf of the Plaintiff that the said evidence of the defendants can not be considered in the absence of the pleadings. It is true that it is well settled principle that no amount of defendants can be looked into in the absence of pleadings in that behalf. However, from the

observations of the first Appellate Court it is clear that though the defendants had not mentioned the exact house numbers of their houses, they have taken the contention that the suit property forms part of their property. They have also contended that the said property was gifted to their father and they were having old house at the said place. So, merely because there is no mention of the house number, we can not jump to the conclusion that the defendants tried to make out a new case at the time of trial. Besides this, we also can not ignore the fact that even at the time of recording of evidence the Plaintiff had not taken objection and gift deed produced by the defendants is also exhibited. So, there is in fact no substance in the arguments advanced on behalf of the defendants that in the instant case, first Appellate Court has considered the evidence for which there were no pleadings. So, no substantial question of law is involved in the present appeal. The first Appellate Court has held that the Plaintiff has failed to prove the alleged encroachment. It is needless to say that this is a finding of fact. There is also nothing to indicate that the said finding is perverse. On the

contrary, we find that the first Appellate Court has taken into consideration the boundaries of the suit property given in the plaint, given in the sale deed, given in the gift deed and given or disclosed from the Commissioner's map. He has categorically observed that the boundaries of the property mentioned in the Sale Deed Exh-118 do not tally with the boundaries mentioned in the report of Commissioner and map of the Commissioner. On the contrary, he has specifically observed that the boundaries of the property which was gifted to the father of the defendants, mentioned in the gift deed tally with the disputed property shown in the Commissioner's map Exh-98. So, I do not think that the finding recorded by the learned First Appellate Court is not borne out from the evidence on record.

12. Thus, when the finding of fact recorded by the first Appellate Court is correct and in accordance with the evidence and there is no substantial question of law involved in the appeal, the same has to be dismissed. Hence, I pass following order :-

O R D E R

The appeal stands dismissed in limine.

Under the circumstances of the case, parties to bear their own costs.

(S.R. SATHE,J.)